

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Review of:) Docket No. UT-023003
Unbundled Loop and Switching Rates; the)
Deaveraged Zone Rate Structure; and) AT&T/MCI OPPOSITION TO VERIZON
Unbundled Network Elements, Transport and) MOTION TO STRIKE HAI MODEL
Termination.)

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (“AT&T”), and WorldCom, Inc., k/n/a MCI (“MCI”) provide the following opposition to the Motion of Verizon Northwest Inc. (“Verizon”) to Strike HAI Model, Release 5.3 (“Motion”). The Commission has already established the consequences of AT&T and MCI’s inability to obtain data from Taylor Nelson Sofries (“TNS”). Verizon simply ignores this aspect of the Commission’s order and provides no legal or factual basis for the Commission to strike the entire HAI Model because of the inability of AT&T and MCI to obtain information about a single set of inputs to that model. Accordingly, the Commission should deny Verizon’s Motion. The Commission should also confirm that AT&T and MCI can comply with Commission requirements by providing TNS information as described below.

DISCUSSION

1 The Commission’s Fourteenth Supplemental Order (“Order”) requires AT&T and MCI to provide data that is within the exclusive possession, custody, and control of TNS concerning creation of customer location clusters used in the HAI Model. The Order specifies, “the Commission directs AT&T and MCI to make every effort to provide that information as requested by Qwest and Verizon,” and observed that when AT&T was unable to provide comparable data in the universal service cost docket, “The Commission proceeded to evaluate the HAI model in light of that fact as well as all the testimony and evidence presented in the

case.”¹ The Commission thus has specified the consequences if AT&T and MCI are unable to provide the TNS information yet continue to use the customer location data developed by TNS in the HAI Model.

Verizon is not satisfied with the remedy the Commission adopted, but Verizon never attempts to justify that dissatisfaction. Indeed, although Verizon devotes a substantial portion of its Motion to summarizing the Commission’s orders,² Verizon never even acknowledges this aspect of the Order. Instead, Verizon mischaracterizes AT&T and MCI’s inability to provide the TNS data as “persistent defiance of [Commission] orders,”³ and Verizon asks the Commission to preclude AT&T, MCI, and Commission Staff from using the HAI model in this proceeding. Verizon, not AT&T or MCI, is the party that is acting in bad faith by bringing a motion that Verizon knows, or should know, is devoid of legal or factual merit.

The most egregious deficiency of Verizon’s Motion is the virtual absence of legal support. Verizon simply asks the Commission to conclude that a party’s inability to provide information in response to an order to compel production is *per se* willful or in bad faith, justifying striking all of that party’s evidence. Had Verizon conducted even a cursory amount of legal research, it would have discovered that courts to have addressed this issue reach the opposite conclusion. The United States Supreme Court, for example, overturned a district court’s dismissal of a complaint for failure to comply with an order compelling production of documents that were not in the possession, custody, or control of the complainant, stating that the Civil Rules “should not be construed to authorize dismissal of this complaint because of petitioner’s noncompliance with a pretrial production order when it has been established the

¹ Order at 7-8.

² Motion at 3-4.

³ Motion at 2.

failure to comply has been *due to inability, and not to willfulness, bad faith, or any fault of petitioner.*”⁴ The Court’s decision, moreover, was based not only on a construction of the applicable federal Civil Rules but on constitutional due process requirements.

AT&T and MCI have not produced the TNS data because they *cannot* produce it. AT&T and MCI have repeatedly informed Verizon and the Commission of this fact, and have provided documentary evidence of their efforts to obtain this data and TNS’ refusal to provide it. Verizon has not alleged, much less produced any evidence to demonstrate, that AT&T and MCI’s inability to obtain the TNS data is the result of any willfulness, bad faith, or other fault of AT&T or MCI. Under these circumstances, Verizon’s request to strike all of AT&T and MCI’s evidence, as well as preclude AT&T and MCI from proffering any additional evidence, is fundamentally inconsistent with established legal precedent.

Verizon also mischaracterizes the facts. Verizon would have the Commission believe that no aspect of the HAI Model is unaffected by the TNS data.⁵ Such a representation is patently false. The HAI Model develops many costs for unbundled network elements (“UNEs”) other than analog loops, including local switching UNEs, that do not rely in any way on the customer location data developed by TNS. AT&T and MCI, moreover, are investigating ways of obtaining or developing customer location data that does not require processing by TNS, which would render moot Verizon’s concerns with the HAI Model arising out of Verizon’s lack of

⁴ *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255, 1267 (1958) (emphasis added); *accord Williams v. Consolidated Investors, Inc.*, 205 Kan. 728, 472 P.2d 248, 252 (1970) (“The penalties permitted by 60-237(b)(2) are not to be imposed for the failure to comply with a production order in the absence of an ability to produce, where a party’ failure to produce is shown to be due to inability fostered neither by his own conduct nor by the attendant circumstances”); *see Newburn v. Howard Hughes Medical Institute*, 594 P.2d 1146, 1148 (Nev. 1979) (stating that in circumstances when documents are not in a party’s possession or control, “one may not be held in contempt for the failure to produce such documents”).

access to TNS data. Indeed, the schedule in this proceeding provides for the filing of supplemental direct testimony in large part to enable AT&T and MCI to provide revised customer location inputs to the HAI Model.

Verizon's Motion seeks to deprive AT&T and MCI of the opportunity to develop such alternative customer location inputs, as well as to foreclose use of the HAI Model to develop UNE costs that do not rely in any way on TNS data. The breadth and scope of Verizon's Motion demonstrate that Verizon is far less interested in obtaining the TNS data than in preventing the Commission from even considering any cost model other than Verizon's own model.

To the extent that AT&T and MCI must continue to rely on the customer location data developed by TNS, the Commission should adhere to the consequence specified in the Order if AT&T and MCI's continue to be unable to produce TNS data. AT&T and MCI have consistently conceded that their inability to produce the TNS data should be considered in the context of the appropriate weight to give their evidence. As the Supreme Court stated,

This is not to say that petitioner will profit through its inability to tender the records called for. . . . It may be that in the absence of complete disclosure by petitioner, the District Court would be justified in drawing inferences unfavorable to petitioner as to particular events. So much indeed petitioner concedes. But these problems go to the adequacy of petitioner's proof and should not on this record preclude petitioner from being able to contest on the merits.⁶

The Commission should reject Verizon's improper attempt to preclude AT&T and MCI from effectively participating in this proceeding.

⁵ See Motion at 5.

⁶ *Societe Internationale*, 357 U.S. at 212-13, 2 L. Ed. 2d at 1267-68.

REQUEST FOR CLARIFICATION

AT&T and MCI request additional guidance from the Commission to comply with the Order and eliminate the concern over customer location data processed by TNS. Pursuant to the Order, AT&T and MCI have made their best efforts to obtain information from TNS on its processing of customer location data to be used in the HAI Model. TNS has agreed that if AT&T and MCI use TNS to process the raw customer location data that Verizon has provided in response to discovery,⁷ TNS will provide – and AT&T and MCI will make available to the parties under appropriate safeguards comparable to the conditions Verizon placed on access to its vendors' competitively sensitive information – the following information:

- (1) an executable of the clustering algorithm used by TNS;
- (2) the inputs for the clustering application;
- (3) the direct output of the clustering process, as well as outputs from each step of the process;
- (4) the Point Code executable;
- (5) databases and the post-clustering input for Point Code;
- (6) demographic data; and
- (7) documentation related to these items.

This information, in conjunction with commercially available geocoding software, will enable Verizon to replicate the process TNS uses to produce the customer location data, as well as to make modifications to that process.

⁷ AT&T and MCI would substitute this customer location data for the comparable data included in the model as filed in AT&T and MCI's direct testimony. Because the customer location data that AT&T and MCI provided in June 2003 would be withdrawn, the issue of access to TNS information concerning development of that data would be moot.

The only information that Verizon would not initially receive would be the source code for the TNS clustering algorithms. This information is particularly competitively sensitive and is not necessary to enable Verizon to have a complete understanding of how TNS processes the data. Nevertheless and to ensure that Verizon has the information it needs, AT&T and MCI will work with TNS to make a representative available to respond to specific questions Verizon has about the process. In addition, to the extent Verizon or other parties identify questions about the code that they believe require access to the decompiled version, AT&T and MCI will make every effort to identify alternative means of providing answers to such questions. In the unlikely event that Verizon can demonstrate that it has a legitimate need for information that only the source code can provide, TNS is willing to provide that code to the Commission and Commission Staff for their evaluation. If the Commission subsequently concludes that Verizon would be unduly prejudiced if Verizon does not also have access to the source code, AT&T and MCI will make their best efforts to persuade TNS to make that information available under appropriate safeguards.

AT&T and MCI believe that this level of disclosure satisfies the concerns expressed in the Order and would permit AT&T and MCI to incorporate the most accurate customer location data into the HAI Model. TNS processing of the Verizon data, however, is time consuming and expensive, and AT&T and MCI would not be willing to incur that expense or devote the time required if the Commission will not give significant weight to that evidence. Accordingly, AT&T and MCI seek confirmation from the Commission that the disclosure to which TNS has agreed will satisfy the Order requirements before having TNS process the Verizon data.

CONCLUSION

Verizon's Motion fundamentally conflicts with the Order, established legal precedent, and the facts of this case. The Commission, therefore, should deny the Motion. The Commission, moreover, should confirm that AT&T and MCI would satisfy the requirements of the Order by providing parties with TNS data as described above.

RESPECTFULLY SUBMITTED this 21st day of November, 2003.

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